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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)**

DANIELLE TEMPLE et al.,

Plaintiffs and Appellants,

v.

DEPARTMENT OF TRANSPORTATION,

Defendant and Respondent.

C082823

(Super. Ct. No. PC-20130567)

Plaintiffs¹ appeal from the judgment of dismissal entered after the trial court granted the Department of Transportation's (Caltrans) motion for summary judgment. (The case was dismissed with respect to a codefendant decedent's estate in May 2015, which is therefore not a party to this appeal.)

¹ They include Will and Danielle Temple, individually, and also as representatives of the estate of their deceased minor daughter Nora and as guardians ad litem of their minor sons.

The plaintiffs filed their notice of appeal in August 2016. They completed their briefing in April 2018. In this court, they renew their arguments that substantial evidence does not support the expert opinion that the adoption of the design for the public property at issue was reasonable, thus defeating the application of design immunity to their legal theory of a dangerous condition of public property. Alternately, they argue the design immunity was lost because of material changes in the condition of the public property. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Pleadings

It is with the operative pleading that we begin, because this delimits the scope of the motion for summary judgment. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 (*Nakashima*).) The pertinent allegations of the first amended complaint are simple and straightforward.

On a November evening in 2012, the decedent was driving westbound on United States Highway 50 (Highway 50) in the Apple Hill area. As the result of dangerous and reckless driving, he lost control of his car to avoid hitting a deer in the No. 2 lane and veered into the eastbound lanes, where the front end of the plaintiffs' car struck his passenger side, killing him (and his wife and son), as well as the Temple family's four-year-old daughter. The rest of the Temple family sustained serious permanent injuries.

The accident occurred at Highway 50 milepost marker 22.38. The cause of the accident was the dangerous and unsafe condition of this stretch of Highway 50, in which numerous broadside collisions had occurred. Caltrans was responsible for planning, designing, constructing, and maintaining Highway 50. In particular, plaintiffs identified the absence of adequate guardrails, barriers, barricades or medians to prevent similar collisions despite Caltrans having notice of the dangerous condition and having issued a

report in 2009 discussing these shortcomings. The complaint did not claim that Caltrans had lost any design immunity (or allege facts to support such a theory).

In its answer to this pleading, Caltrans asserted immunity (Gov. Code, § 830.6) for reasonably approved designs for this stretch of Highway 50. The plaintiffs did not further amend their complaint to assert facts demonstrating that this immunity was lost because Caltrans had notice of dangerous changes in the condition of the highway since its construction.

Defendant's Showing in Support

Defendant's statement of undisputed facts is concise. It conceded that there was a causal connection between the design of Highway 50 at the location of the collision and the accident. The design plans received discretionary approval before the construction of this section of the highway in accordance with those plans. The plans satisfied the applicable standards that were in effect at the time of the approval, including signage and the absence of a median barrier.

There have not been any changes in the physical condition of the roadway at the location of the collision since that time that subsequently created a dangerous condition, and even if any physical changes exist, Caltrans had not had any notice of them and has not had a reasonable amount of time to respond to them. (These points are addressed to changed physical conditions, an issue that was not framed in the pleadings, which as noted in the Discussion means we do not need to include the specifics of the evidence in support of these points.)

In its supporting evidentiary showing, Caltrans demonstrated that the segment of the highway at the collision location was a paved highway consisting of four lanes that were relatively straight and ascending to the east with a four-foot-wide median marked on each side with double yellow lines and a westbound shoulder that increased at some point from two to four feet. In April 1963, Caltrans engineers approved the design that

incorporated the median without a barrier, which was completed as planned. In 1992, Caltrans engineers approved a design for the installation of barriers before milepost 22 (segment A) and after milepost 25.8 (segment C), which was completed as planned. These other segments are dissimilar, because they include turning lanes in the median. The subject segment B (from milepost 22 to 24) included numerous public crossings, which made a median barrier inappropriate because it actually increases accidents when the roadway is not a limited-access freeway and is instead merely an “expressway” (for which such barriers are not mandated). (*Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802, 804 [the installation of a median reflects a “trade-off” between cross-median accidents and other accidents that the presence of the median can increase].) Moreover, there would be numerous 1,000-foot gaps in a barrier to allow for sight lines at each of these intersections in the expressway, exposing drivers to barrier ends, which is why a barrier would not be required despite the volume of traffic shown in a 2009 study. This would need to be addressed in the future with an interchange.

In 2009, Caltrans repaved and remarked Highway 50 in a segment including the collision location, a project that did not require any upgrading to then current standards. These are the only changes since the 1960’s. There were signs warning of cross-traffic ahead; deer crossing signs were not needed for the location. In the opinion of the defense expert, the original 1960’s design and the 1992 update were the subject of discretionary approvals that satisfied the design standards of that time for a “constrained” Sierra Nevada location, and the project was completed in accord with the plans; a median barrier on an expressway was recommended only where the average daily traffic was in excess of 60,000 vehicles, and in any event was not considered an appropriate solution for segment B because of the multiple public crossings. Moreover, the accident location has not had sufficient collisions even under a 2012 policy to warrant median barriers, or in a database tracking accidents for 10 years prior to the present incident. Again,

warrants² and studies regarding medians are not standards for expressways but are merely guidance.

From 2003 to 2012, 81 million vehicles used segment B. The average daily traffic varied between 21,000 and 25,000 vehicles between 2003 and 2012. Out of 25 other vehicle collisions during this period, there were only 11 incidents referencing deer, of which only one was a documented cross-median collision involving a deer (a carcass in the roadway); there was also one incident of a rear-ending collision involving a deer, and a claim by an intoxicated driver that a deer had caused him to swerve off the road. According to various project studies (the initial planning document), there are 13 public intersections and five driveways in segment B, and most of the broadside collisions were the result of drivers turning left without yielding to oncoming traffic; to install barriers would require the construction of an underpass costing more than \$50 million, for which funds had not been available as late as 2016.

Plaintiffs' Showing in Opposition

In their opposition, plaintiffs did not offer a counter-declaration from an expert on the element of the reasonableness of the roadway design. Rather, they simply offered numerous evidentiary objections to the declaration of the Caltrans expert.

Plaintiffs also designated an additional 70-odd material facts as disputed. Predominantly, these address notice of changed conditions since the approval of the

² A 1997 median barrier study warrant review explains that a warrant “provides guidance to the engineer in evaluating the potential safety and operational benefits of traffic control devices and is based upon ‘average’ or ‘normal’ conditions. It is used as a justification for study of a particular location, section, or element of a highway. A warrant is not a substitute for engineering judgment. The fact that a ‘warrant’ for a particular traffic control or safety device is met is not conclusive justification for the installation of the device. The unique circumstances of each location and the amount of funds for highway improvements must be considered in determining whether or not to install a traffic control or safety device.”

roadway in the 1960's. Again, we will not detail them for the reasons explained in the Discussion, *post*. In essence, they focused on increase in traffic volume since the 1960's (including a rise in the number of tourists to the area), an increase in the speed limit in 2007, "wildlife incursions," prior accidents, and studies by Caltrans regarding the feasibility of upgrading the segment without barriers to a freeway with barriers. They also offered the declaration of an engineer attesting to 205 other accidents on a segment of Highway 50, from just before milepost 22 to just after milepost 24, of which Caltrans assertedly had notice. The engineer did not, however, offer a foundation as to whether these accidents were substantially similar to the one involving plaintiffs.

Trial Court's Ruling

Although we review the ruling de novo (*County of Sacramento v. Superior Court* (2012) 209 Cal.App.4th 776, 778), the trial court is not a " 'potted plant' " to be overlooked (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230). As a result, an appellant must affirmatively demonstrate error in its reasoning (*Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 588 (*Imagistics*)). In its minute order, the trial court adopted its lengthy tentative decision.

The court overruled the objections of plaintiffs to the Caltrans expert's declaration, as well as objections to other declarations. (Although on appeal plaintiffs challenge the substance of the expert's declaration, they do not address the trial court's rulings on their evidentiary objections to it, so these are forfeited.) It also sustained most of Caltrans's objections to the engineer's declaration on behalf of plaintiffs for want of a foundational showing of substantial similarity of accidents outside of segment B. In reviewing the summary of accidents that Caltrans had submitted, it noted there were only 25 other accidents in whole, only 12 of which were wildlife related. The latter, as noted, involved only one median crossing and one unsubstantiated account of an inebriated driver.

The trial court concluded plaintiffs had failed to submit any evidence to create a triable issue of material fact with respect to the first two elements of the defense of design immunity: a causal connection between the design and the accident, and the design being subject to discretionary approvals before the construction of the roadway. The court also concluded plaintiffs had failed to show there was an absence of substantial evidence to support the defense expert's opinion that the approval of the road design was reasonable; "[t]he objections to the defense evidence having been overruled and plaintiffs not having submitted any evidence in opposition to raise a triable issue of material fact," the opinion was substantial evidence of reasonability (citing *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1264, 1267). The court then addressed whether changed circumstances resulted in the loss of design immunity. It found that the failure to include either the purported increase in traffic volume or speed limits as allegations in the complaint precluded reliance on these factors in opposition to summary judgment. It noted, nonetheless, that plaintiffs had failed to produce any evidence that traffic volume or speed played any factor in the accident. Although this too was absent from the pleadings, the trial court also found that plaintiffs had failed to satisfy the strict standard of substantial similarity between the other accidents included in their expert's declaration and the present accident necessary to establish the development of a dangerous condition from changed circumstances (citing our decision in *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1072).

DISCUSSION

1.0 Plaintiffs Are Precluded From Asserting Loss of Design Immunity

As our former presiding justice has noted, a plaintiff cannot oppose a motion for summary judgment on a theory that is not embraced in the operative pleading. (*Whelihan v. Espinoza* (2003) 110 Cal.App.4th 1566, 1576 [cannot defeat primary assumption of the risk as a defense with a theory of reckless conduct unsupported in pleading]; accord,

Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265 [same]; see Weil & Brown, Cal. Practice Guide: Civ. Procedure Before Trial (The Rutter Group 2018) ¶ 10:257, p. 10-118.)³

Plaintiffs alleged a theory of the dangerous condition of a public highway, and did not include any allegations of fact on which they could rest a challenge to the presumed defense on the part of the public entity of design immunity. When Caltrans in fact raised this affirmative defense, plaintiffs did not amend their *pleading* to include facts regarding changes in circumstances that could defeat this defense, instead simply adducing facts in their opposition to this effect. The trial court commendably responded on the merits to the theory of loss of design immunity through changed conditions, after observing that this theory had been forfeited because there is an absence of any allegations of fact to support it in plaintiffs' operative complaint. We, however, are not obligated to do the same and adhere to our position in *Whelihan* that this theory is not an issue on appeal. As we accordingly do not have a duty to give plenary response to this argument, we simply note that we are in agreement with the trial court's resolution of it.

³ This necessity to amend first for purposes of opposing summary judgment is reinforced in the context of claims against public entities, where a pleading is subject even to a demurrer for failure to include allegations to avoid an immunity that its allegations otherwise suggest would apply. (Cal. Gov. Tort Liability Practice (Cont.Ed.Bar 4th ed. 2014) § 12.137, p. 1039, citing inter alia *Giannuzzi v. State of California* (1993) 17 Cal.App.4th 462, 467; *Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882.) A motion for summary judgment necessarily includes a test of the sufficiency of the complaint, and thus incorporates a motion for judgment on the pleadings. (*Nakashima, supra*, 231 Cal.App.3d at p. 382.) In this respect, the trial court's alternative holding that rejects *evidence* of changed conditions in response to the assertion of design immunity would properly reflect judgment on the pleadings, given that the complaint would have been subject to demurrer on this basis.

2.0 The Omission of a Median Barrier in 1992 for Segment B Was Reasonable

Plaintiffs do not argue that the original design from the 1960's was unreasonable.⁴ They instead contend the decision in the 1990's to exclude segment B from the decision to install median barriers on segments A and C was unreasonable, contending that neither the 1991 project report nor the defense expert declaration are substantial evidence that the decision to approve the project was reasonable. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350 [design immunity can be established through *either* an appropriate discretionary approval of a plan or evidence of compliance with standards]; *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 941 [approval of plan by competent professionals or an expert opinion that approval was reasonable are sufficient evidence of reasonableness].) As the trial court pointed out, plaintiffs' lack of an expert counter-declaration leaves them with this strategy in opposing summary judgment.

Regarding the 1991 project report that Caltrans officials approved, plaintiffs contend it is contradictory because it admits that cross-median accidents are a concern in segments A and C—studies indicating that medians are warranted—but does not explain why the numerous public crossings in the accident segment are a reason to omit the barriers. They also contend the failure to include the studies as attachments means the conclusion to omit the barrier in segment B is factually unsupported. Ultimately, however, this claim is immaterial.

⁴ In point of fact, under their heading devoted to the 1990's redesign, plaintiffs advert to the failure in the 1960's to honor a 1959 Caltrans resolution to construct a freeway through the accident location. Beyond the fact that this claim is forfeited as a “‘lurking’” argument (*Imagistics, supra*, 150 Cal.App.4th at p. 593, fn. 10), they fail to advance any authority that this aspirational resolution represents a mandated standard or the approval of a specific construction plan, and a 1959 planning manual to which they cite notes standards of medians for *urban* expressways and mountainous freeways that are part of the Interstate Highways System.

The defense expert independently examined the physical layout of segment B, unchanged in any material respect from the 1990's, and was fully aware of all historical barrier recommendations. She explained repeatedly that it was reasonable to omit barriers in segment B because it was an expressway with multiple public crossings for which barrier openings would be necessary (exposing traffic to crashes with barrier ends). She also explained that there are not any standards that require barriers on nonurban expressways regardless of traffic volume or speed, the decision resting on the unique nature of the segment at issue. A 1997 report on median barrier warrants that she supervised—to which plaintiffs refer—makes these same points, so it does not in any sense “contradict” her declaration in the present matter. It is also immaterial that she did not address the attachments missing from the project report, because she came to the same conclusion as the project report independent of the missing attachments based on her own observations of segment B's characteristics. That she came to the same result on the same facts in light of her *own* expertise does not indicate she merely “parroted” the report. Moreover, her review of actual accident data shows that despite high volumes of traffic, segment B does not reflect an unduly high level of accidents of *any* type, let alone cross-median accidents such as the one at issue. (E.g., *Callahan v. City and County of San Francisco* (1971) 15 Cal.App.3d 374, 380 [one accident per 685,000 cars further evidence of reasonability of design].)

Plaintiffs also fail to demonstrate that the 1990's approval contravened existing *standards*. Warrants, as explained in the 1997 warrant review cited above (fn. 2, *ante*), are not mandates but guidance, as is also explained in the 1987 traffic manual and a 1991 Caltrans “median barrier practice” report on which plaintiffs rely (the latter of which expressly states, “it has not been possible to develop warrants for non-freeways . . . [as] [e]ach site is unique”). Plaintiffs also refer to earlier reports that do not exist in the record beyond historical references in the defense expert's 1997 report, and which in any

event are obviously superseded by subsequent policy statements such as the 1987 traffic manual. As for plaintiffs' reference to a 2009 Caltrans report studying the possibility of upgrading segment B to a freeway to reduce accidents because of the safety concerns presented by the numerous public crossings, this obviously cannot have any bearing on the decision in 1992 to omit a barrier.

Finally, there is plaintiffs' assertion that the expert *should have* considered segments A through C as a whole in evaluating the absence of barriers in segment B. To the extent this is suggesting there is a dangerous condition from the combination of the three segments, this theory is outside the scope of their pleadings and accordingly may be ignored. The expert distinguished sections A and C on the absence of a significant number of *public crossings* and the presence of turn lanes where they abut segment B. That there may be *private driveways* within all three segments does not downplay the significance of *multiple public crossings* within segment B that must be accommodated until such time as an interchange above or below grade can be afforded.

Plaintiffs have failed to demonstrate that the defense expert's conclusions in her declaration lacked substantial evidence in support. Therefore, even if Caltrans's approval of the 1991 project report were not sufficient of itself to support the application of design immunity, the expert's declaration has the same effect.

DISPOSITION

The judgment is affirmed. Caltrans shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

_____**BUTZ**_____, J.

We concur:

_____**HULL**_____, Acting P. J.

_____**MAURO**_____, J.